

simple -- to offer the greatest variety of programming to subscribers. Thus, Armstrong suggests that the Commission adopt one definition which offers viewers the greatest choice of programming, and apply it equally to NCE, commercial, and network stations.

#### **G. Low Power Television Stations**

The Act provides very specific criteria by which LPTV stations may assert must-carry rights. Since the Act requires the FCC to make a determination whether a LPTV station is "qualified" for must-carry status, Armstrong has no doubt that the burden of proving its qualifications is on the LPTV station alone. Further, the FCC should clarify that the cable operator is not obligated to carry a LPTV signal unless and until the FCC issues a final determination that the station is qualified. Finally, any waiver policy adopted by the Commission for applying this rule must follow strict guidelines because Congress has been very specific in setting forth strict qualifying criteria for the mandatory carriage of LPTVs.

### **IV. GENERALLY APPLICABLE MUST-CARRY OBLIGATIONS**

#### **A. Channel Positioning Issues**

Under the Act, cable operators are required to place commercial must-carry stations on the cable system channel number on which: (1) the station is broadcast over-the-air; (2) the station was carried on July 19, 1985; or (3) the station was carried on January 1, 1992. NCE signals are to be carried on: (1) the cable system channel number on which the station is broadcast

over-the-air; (2) the channel number on which the station was carried on July 19, 1985; or (3) a channel number mutually agreed to by the station and the operator.

As the Commission recognizes, it is likely that more than one station will have a claim to the same channel number. NPRM at ¶ 33. The Commission also recognizes that there is some tension between the on-channel carriage provisions and the requirement that operators establish a "basic tier" which must contain all must-carry signals. Id. Given the likelihood that more than one station may claim the same channel number, the Commission tentatively concludes that "stations be entitled to their over-the-air channel position only when that channel is encompassed by the basic service tier." Id. Armstrong agrees with the Commission's position.

Thus, a station's right to any specific cable channel number must be limited to those channels which the operator allocates to the basic tier. Not only off-air "on-channel" rights, but also rights to the channel based on a station's carriage on July 19, 1985 or January 1, 1992, can be exercised only if those channels are encompassed in the basic tier. It is technically infeasible to have the basic tier channels scattered all over the cable channel spectrum. It would also be disruptive and confusing for the subscribers.

The operator must also make the final determination with respect to channel assignments on the basic tier. This is the only realistic way in which channel positioning disputes can be

resolved. To allow such a determination by the operator would save valuable Commission resources.

#### **B. Broadcast Signal Quality**

One of the prerequisites for mandatory carriage is that the broadcast station deliver to the cable operator's principle headend "either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment." NPRM at ¶ 17. Consistent with the Act's requirement that the broadcast station bear whatever expenses are associated with "delivering" a good quality signal, the station requesting carriage must, as a prerequisite, arrange and pay for any tests that may be required to determine whether the station's signal complies with the Act's signal strength requirements. Moreover, the signal strength must be measured at the "principle headend" designated by the cable operator using a standard test antenna. It is at this point that the signal is general picked up off-the-air, and carriage should be based on the signal level measurements at the principal headend. A television station's efforts to utilize extraordinary means such as microwave to deliver a signal to the headend cannot be considered as a method to establish the must-carry status of a signal.

#### **C. Compensation for Mandatory Carriage**

A cable operator is not required to carry a station that is otherwise eligible for must-carry status if the station does not agree to indemnify the operator for any copyright liability resulting from its carriage as a "distant signal." In determining

the amount of copyright payments owed, cable operators first calculate the "distant signal equivalent" or "DSE,"<sup>12/</sup> which is the numerical value given to each distant television station. Cable operators then pay .893% of their gross receipts for the first DSE; .563% for each of the second, third and fourth DSE; and .265% for each fifth and additional DSEs. Armstrong requests that the Commission adopt a rule which allows the cable operator to designate the priority of DSEs for copyright purposes, and inform the station accordingly of its copyright liability.

#### **D. Procedural Requirements and Remedies**

The Act requires cable operators to provide 30 days prior notice before deleting or repositioning any must-carry station. With respect to NCE stations, the operator also must give notice of the deletion/repositioning of the NCE station to its subscribers. This is not inconsistent with many franchise agreements which also require at least 30 days prior notice to the station and to the subscribers of a deletion or repositioning of a station. Therefore, the 30 day notice requirement is a reasonable one.

Armstrong submits that if the dispute with either a commercial or NCE station involves the deletion or repositioning of the station, the station should be required to file its complaint within the 30 day notice period provided by the cable operator of the intended deletion or repositioning. Clearly, the purpose of the required 30 day notice before a station is deleted or

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<sup>12/</sup> Independents are a full DSE, networks and educational stations are 1/4 DSE.

repositioned is to provide the station with time to object to the deletion/repositioning. It is not in the public interest for a station to file a complaint after the proposed change went into effect. Therefore, the Commission must require that once a station receives notice of a proposed deletion or repositioning, the station must file its complaint within that 30 day period or lose its right to complain.

If a commercial station submits a complaint including must-carry to the cable operator, the operator has 30 days to respond. Section 614(d)(1). NCE stations would submit a complaint directly to the Commission. The Commission has proposed that the operator also be served with the complaint, and have 10 days to respond. Certainly, Armstrong agrees that the NCE station must serve a copy of the complaint on the operator. This is the minimum required by due process considerations. However, Armstrong submits that affording the operator only 10 days to respond is an insufficient amount of time. The Act provides a 30 day response time for commercial station complaints and is silent about the timing of a response to a NCE complaint. Since Congress felt that a 30 day response time in the commercial context was reasonable, it should be applied to NCE stations as well. At a minimum, the Federal Rules of Civil Procedure provide a 20 day period to respond to a complaint. F.R.Civ.P.12(a). Therefore, Armstrong urges the Commission to adopt a time period of no less than 20 or 30 days to respond to a NCE station's complaint. Both commercial and NCE

stations would then have 10 days to oppose the cable operator's answer. The operator should then have 10 days to reply.

The Act provides that the Commission has 120 days after a complaint is filed with the Commission to determine whether a cable operator has fulfilled its must-carry obligations. If a cable system wrongly refused to carry a station, then the Commission may require that the system carry the station.

The Commission must provide an appropriate time frame for the cable operator to comply with any remedial measures imposed by the Commission. If a station is ordered to be added to the cable system, the operator must have at least 90 days to implement such an order. This time is needed so that other stations being carried on the system may be notified that they must be moved or deleted to accommodate the Commission's order. As indicated above, the operator is required to give 30 days notice of any deletion or repositioning. Implementation of an order from the Commission directing it to carry a specific station may trigger complaints from stations that must be moved or dropped, thus time is required to account for this possibility. The operator also needs 90 days to notify its billing company that notices must be sent to subscribers in their monthly bills. For these reasons, Armstrong suggests that the time period for implementing any remedial order be no less than 90 days.

## V. RETRANSMISSION CONSENT

### A. The Act's Definition of "Multichannel Video Distributor" Applies to DBS, MMDS, MATV and SMATV

The retransmission consent provision of the Act states: "no cable system or other multichannel video distributor shall retransmit the signal of a broadcasting station" without its express consent. Section 6(b)(1). The retransmission consent requirement does not apply to: (1) non-commercial broadcast stations; (2) home satellite reception of a non-network signal carried via satellite on May 1, 1991; (3) home satellite reception of a network signal to a non-cable household; and (4) "superstations" carried via satellite on May 1, 1991. Section 6(b)(2).

As the Commission notes, the definition of "multichannel video programming distributor" is extremely broad.<sup>13/</sup> The plain language of this provision includes direct broadcast satellite service ("DBS"), and multipoint, multichannel distribution service ("MMDS"). The last phrase of this definition, "a television receive-only satellite program distributor, who makes available for purchase . . . multiple channels of video programming" specifically describes the master antenna television service (MATV) and the satellite master antenna service ("SMATV") operator. "A satellite

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<sup>13/</sup> The Act defines "multichannel video programming distributor" as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(12).

master antenna (SMATV) system receives radio signals transmitted by satellite to an earth station atop a multiple unit building and distributes the signals through an MATV system within the building."<sup>14/</sup> It is clear that Congress intended that DBS, MMDS, MATV and SMATV operators obtain the consent of any broadcast station whose signal the operator wished to retransmit.

The fact that Congress set forth four specific exceptions to the retransmission consent requirement, exceptions which do not include DBS, MMDS, MATV or SMATV operators, demonstrates that these entities are subject to the retransmission consent provisions of the Act. Under the doctrine of "expressio unis est exclusio alterius" ("the expression of one thing is the exclusion of another"), if a statute specifies one exception to a general rule, other exceptions or effects are excluded. See, Andrus v. Glover Construction Co., 446 U.S. 608 (1980). Thus, the fact that these types of multichannel video distribution methods were not specifically exempt where Congress has identified specific exemptions, shows that DBS, MATV, MMDS, and SMATV operators may not retransmit a station's signal without its consent.

Statutory construction aside, Congress' rationale behind the retransmission consent requirement further demonstrates its applicability to these types of multichannel video delivery. The Conference Agreement specifically found that:

cable systems obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the

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<sup>14/</sup> Definition of a Cable System, 5 FCC Rcd. 7638, 7639 (1990).



broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters.

Conference Report 102-862 at p. 58. This rationale applies equally to the retransmission of broadcast signals via DBS, MMDS or SMATV. The stated purpose of the retransmission consent provision is to enable the broadcast station to determine the conditions by which its signal may be utilized. Multichannel video distributors receive a benefit from the ability to provide local broadcast signals to their subscribers and customers. Thus, the retransmission consent requirement is Congress' attempt to create a more equitable "marketplace" by which the station can bargain for the retransmission of its signal.

Armstrong believes the language of the statute is perfectly clear on this point -- that multichannel video distributors include DBS, MMDS, MATV and SMATV. Accordingly, Armstrong suggests that the Commission explicitly delineate which entities fall within the scope of the definition of "multichannel video distributor" in its final rules promulgated in this proceeding.

**B. Broadcast Stations Must Make the Same Election for All Cable Systems Within a Franchise Area**

By October 6, 1993, and every three years thereafter, broadcast stations are required to elect either mandatory carriage or retransmission consent. The Commission observes that the Act requires that a station's election apply equally to all cable systems serving the "same geographic area." NPRM at ¶ 45. Thus,

the Commission interprets this provision to mean that the "same election requirement" applies to "directly competing cable systems," but not systems in the same television market which do not overlap. Id.

The Commission construes the term "geographic area" used in the Conference Report to refer to the television market rather than the cable operator's franchise area. However, the Report's statement "[i]n situations where there are competing cable systems serving one geographic area, a broadcaster must make the same election with respect to all such competing cable systems,"<sup>15/</sup> appears to refer to the cable operator's service area. Since Congress undoubtedly understands that the operator's service area is defined by the franchise, the franchise area, not the television market, is the relevant market which triggers the same election requirement.

Armstrong submits that the Commission should clarify that the same election requirement is triggered when the franchise area of competing cable systems overlap. Whether two cable systems are located within the same television market or whether the systems' physical plants overlap, should not be the criteria for determining whether the same election requirement applies. The franchise area is the relevant market area of competition for cable operators.

Finally, the Commission notes that "superstations" are exempt from the retransmission consent requirement, as long as the

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<sup>15/</sup> "Cable Television Consumer Protection and Competition Act of 1992," Conference Report No. 102-862, p. 76.

station was carried on a satellite as of May 1, 1992. Clearly, superstations carried via satellite after May 1, 1992 are not exempt. However, the Commission asks whether superstations carried via satellite before May 1, 1992, but delivered to a cable system by microwave, may also be exempt from the retransmission consent provision. Armstrong submits that a qualified "superstation," i.e., one which was carried via satellite before the cut-off date, is exempt from the retransmission consent requirement. The mere fact that the cable system may be picking up the superstation's signal from a microwave link, or off-the-air rather than satellite dish is irrelevant. To decide otherwise, would require the cable operator to go to the unnecessary expense of picking up the same signal via satellite.

**C. Implementation Schedule for Must-Carry  
and Retransmission Consent**

The Act prohibits cable systems from retransmitting the signal of a broadcast station without its consent after October 6, 1993, unless the broadcast station has chosen to assert its mandatory carriage rights. One of the Commission's concerns is whether the Act requires the must-carry provisions go into effect as soon as the Commission adopts rules and regulations in this proceeding, approximately early April, 1993. This would be well ahead of the October 6, 1993 implementation date for retransmission consent. Armstrong submits that the Commission must make both provisions effective concurrently.

The necessity for requiring stations to make the must-carry or retransmission consent election concurrently should be

fairly obvious. Clearly, the operator will have to accommodate the mix of NCE and commercial must-carry stations with retransmission consent stations, as well as any other broadcast signals it wishes to carry. If the must-carry provisions went into effect before retransmission consent, then stations could assert must-carry rights up until the date the retransmission consent election was required. Operators would have to go through a piecemeal process of adding or deleting stations as they choose to assert their must-carry rights. Then, operators would be required to implement additions and deletions resulting from those stations asserting retransmission consent rights. The result would be that operators could be forced to reconfigure their systems several times, creating duplicative costs, delays, and subscriber frustration.

Secondly, unless must-carry and retransmission consent choices are made concurrently, the operator will have no idea how many channels will be required for each use, and which stations may have priority rights to certain channel positions. Nor can the operator effectively negotiate retransmission consent agreements unless it knows what programming will be available from the must-carry stations on its system. Clearly, there is no reason for an operator to expend time negotiating for program material which he may be required to carry anyway. Similarly, an operator must be able to anticipate which program material will only be available via retransmission consent so that back-up alternative arrangements might be made to obtain this programming from other sources.

Otherwise, subscribers may be deprived of any access to some programming.

Moreover, as the Commission is well aware, the copyright reporting periods commence January 1 and July 1 each year. Obviously, there is a reluctance to add or delete a station during a copyright accounting period since the full liability is due regardless of whether the station was carried only part of the period. Armstrong urges the Commission to adopt an election date that becomes effective either January 1 or July 1. In the alternative, the Commission must allow must-carry stations to schedule the commencement of their carriage at the beginning of a copyright period if they choose, since, under the Act, must-carry stations that are distant signals are required to indemnify the operator for copyright liability. With respect to retransmission consent stations, compensation for copyright liability will certainly be an issue to be negotiated among the parties.

Finally, cable operators must have at least 90 days from the date that the election is made to implement the carriage of stations pursuant to must-carry or retransmission consent. This time is necessary for several reasons. First, under many franchise agreements as well as the Act, operators must notify stations and their subscribers at least 30 days in advance of any deletion or repositioning of a station. Second, systems will have to be technically reconfigured. In many cases, this will require a service call to the subscriber's home to install or remove channel blocking equipment. In other cases, additional equipment must be

order and installed. Third, in order to notify subscribers in a timely manner, the operator's billing company must be notified in advance so that the proper notices are inserted with the bill. Finally, the Commission must take into account the fact that operators are prohibited from deleting or repositioning stations during sweep periods.

For the foregoing reasons, Armstrong urges the Commission to make effective both the must-carry and retransmission consent provisions 30 days after a final order in this proceeding. Thus, 30 days after the issuance of a final Report and Order in this proceeding, broadcast stations would be required to make their must-carry/retransmission consent election. The Commission must then afford cable operators 90 days from the election date to implement the stations' elections.

#### D. Broadcast Station Notification of Election

As the Commission suggests, a broadcast station must place a notarized copy of its must-carry/retransmission consent election in its public file. As a prerequisite to requesting mandatory carriage or negotiating a retransmission consent agreement, the station would be required to supply the cable operator with a copy of the election. Because of the importance of documenting and following its election, a station that did not follow this procedure should be treated as though it had made no election.

The Commission must also address the implications of what happens if a station fails to make an election. This could result

when the station does not follow the Commission's procedures for notification, or where the station simply failed to take any action. If the cable system is already carrying a station which has failed to indicate its election, then the operator should be permitted to continue to carry the station at its discretion, but without any of the rights associated with mandatory carriage.<sup>16/</sup> It would seem that if the station was not being carried by the operator, then the operator would be prohibited from carrying the signal. Further, if a station missed the election "window" and tried to assert either must-carry or retransmission consent rights, it should be precluded from doing so until the next three year period.

Of course, as the Commission recognizes, it must make an exception for new stations that go on the air in a period in between elections. Armstrong submits that the 60 day time period proposed by the Commission is insufficient. In order to effectively notify other stations and subscribers of a deletion or repositioning to accommodate the new station, operators need at least 90 days to implement such a change.

#### **E. Relationship Between Must-Carry and Retransmission Consent**

The Commission asks several questions concerning the relationship between the must-carry and retransmission consent provisions of the Act. First, the Commission tentatively concludes in the NPRM that stations carried pursuant to retransmission

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<sup>16/</sup> To avoid confusion, this type of signal should be referred as a may carry signal.

consent should count toward the required number of must-carry stations that a cable operator is required to carry. Armstrong agrees with the Commission's position.

Second, must-carry stations receive certain rights set forth in the Act. Cable operators are required to retransmit the information contained in the vertical blanking interval (VBI) when they retransmit the programming of a must-carry station. Must-carry stations may also claim rights to certain cable channel positions. However, stations which choose retransmission consent rather than mandatory carriage may not assert channel positioning rights or require the retransmission of the information contained in the VBI. Rather issues such as channel positioning or VBI should be negotiated by the parties.

Third, cable operators should not be required to carry the full program schedule of a retransmission consent station. Clearly, this is an issue to be negotiated with the station. However, in order to maintain programming flexibility, the carriage of a partial program schedule of a retransmission consent station should count as one channel toward any statutory must-carry requirement.

Finally, as discussed above, stations which assert retransmission consent rights should not be able to assert network non-duplication or syndicated exclusivity rights against other stations carried by the operator. Exclusive program exhibition rights are among the issues to be negotiated between the retransmission consent station and the cable operator.



## F. Retransmission Consent Contracts

### (i) Terms and Conditions

The essence of the retransmission consent provision is to "establish a marketplace for the disposition of the rights to retransmit broadcast signals."<sup>17/</sup> As the Commission notes, retransmission consent contracts may contain provisions which are identical to must-carry rights, such as channel positioning, syndex and network non-duplication rights. The difference is that these rights are mandatory for must-carry stations, and negotiable for retransmission consent stations.

Armstrong agrees with this interpretation. The Act does not preclude a retransmission consent station from bargaining for rights associated with mandatory carriage. Of course, the Act is clear that a negotiated retransmission consent agreement cannot conflict with any of the rights asserted by a must-carry station on the system. However, the Commission must recognize some additional principles governing retransmission consent contracts.

First and foremost, the Commission must recognize that the must-carry/retransmission consent election runs with the station. If a broadcast station or cable system changes ownership during the three year election cycle, then the contract would be binding on the new owner. Consistent with the Act, broadcast stations would be precluded from changing their election or the terms of any retransmission agreement as a result of a change in

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<sup>17/</sup> Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92 ("Senate Report"), 102d Cong., 1st Sess. (1991) at p. 36.

ownership. Rather, the election, as well as the terms, are fixed for a period of three years. This result is required by the Act, and as a public policy, the Commission should recognize the benefits of minimizing unnecessary disruptions in the cable system's program schedule.

Second, consistent with the requirement that a broadcast station make the same election with respect to all cable systems in a franchise area, no retransmission consent agreement should permit the exclusive carriage of the broadcast signal which precludes another cable system or multichannel video provider in the franchise area from obtaining access to that station's programming. Such a provision would not be in the public interest because it would leave one system's subscribers without access to that station's programming. If a station chooses to provide its signal to cable systems only under retransmission consent, then the station should be obligated to negotiate in good faith with all cable systems in the franchise area for access to its programming.<sup>18/</sup>

(ii) Preemption of State Court Jurisdiction

The Commission has tentatively determined that disputes involving retransmission consent contracts be resolved in state court. NPRM at ¶ 57. Armstrong strongly disagrees with this position. The scope and comprehensive nature of the Act preempts

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<sup>18/</sup> While the terms and conditions of retransmission consent agreements within a franchise area do not have to be identical, the Commission should make it clear that the failure to bargain in good faith for the purpose of creating a de facto exclusive arrangement will not be tolerated.

all state action regulating cable television systems and cable operators' relationships with broadcast stations. State law causes of action regarding retransmission consent contracts are similarly preempted.

Federal preemption of state and local law is required where Congress has expressed its intent to "occupy the field" in a particular area or when an "actual conflict" between federal and state law exists. The Supreme Court has already recognized that the FCC has preempted "all operational aspects of cable communications, including signal carriage and technical standards." Capital Cities Cable Inc. v. Crisp, 467 U.S. 691, 702 (1984). The FCC's exclusive jurisdiction also extends to cable carriage of "pay cable" services and the "regulation of importation of distant broadcast signals." Id. at 703, 704.

Where Congress has occupied a field, a state law cause of action to enforce legal or equitable rights that are equivalent to rights afforded under the federal law, are also preempted. Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F.Supp. 838, 849 (D.Mass. 1986) (Cable operator's state law claim of conversion was preempted by the Copyright Act). See also, Harrison Higgins, Inc. v. AT&T Communications, 697 F.Supp. 220 (E.D.Va. 1988) (breach of contract and negligence causes of action were preempted through Communications Act).

The potential issues that could arise under retransmission consent contracts will most likely include issues regarding channel positioning; information to be contained in the

VBI; signal quality; program schedules; and the extent of syndex and/or network non-duplication rights. These are issues which involve rights that are already within the scope of the Commission's regulations or the 1992 Cable Act.

In addition, the retransmission consent provision is inextricably intertwined with the must-carry and rate regulation provisions. First, any negotiated terms contained in retransmission consent agreements may not conflict with a must-carry station's rights. Second, the 1992 Cable Act expressly preempts state and local regulation of its must-carry provisions, and vests the FCC with exclusive jurisdiction to resolve disputes concerning issues of mandatory carriage. Thus, any judicial review of a retransmission consent contract must consider the effect, if any, on mandatory carriage. Third, the FCC is directed by Congress to consider the impact retransmission consent will have on cable television rates. Therefore, issues regarding compensation under a retransmission consent contract must also take into account any federal regulations governing cable television rates.

Moreover, where the federal government has occupied the field and the federal statute or federal regulations promulgated thereunder fail to deal with a particular question, "the courts are to apply a uniform rule of federal common law." Harrison Higgins, supra, 697 F.2d at 224.<sup>19/</sup> If the FCC does not choose to exert

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<sup>19/</sup> As the Court in Higgins stated: "The claims in the present case . . . involve breach of contract and negligence in the provision of interstate telecommunications services, but are not governed by the Communications Act. Higgins therefore has a cause of action under federal common law." Id. See also,

exclusive jurisdiction over the resolution of disputes governing retransmission consent contracts, then federal courts would have jurisdiction to resolve such issues, not state courts.

Finally, the FCC is the agency with the relevant expertise to resolve these disputes. Delegating to federal courts the task of resolving disputes regarding issues that are within an agency's delegated authority and particular expertise would be an affront to the concepts of primary jurisdiction and judicial efficiency. Establishing exclusive jurisdiction in the Commission to resolve retransmission consent matters will establish a uniform body of case law as this new era in cable/broadcaster relationships develops. Therefore, the FCC is the entity best suited to balancing the public policy goals of this legislation with the interests of the parties.

**G. Program Exhibition Rights and  
Retransmission Consent**

The retransmission consent provision of the Act will be completely ineffective unless the Commission firmly establishes that the broadcast station has the right to grant its unfettered consent to the retransmission of its signal, which includes the right to exhibit the programming contained in the signal.

The broadcast station's right to grant or withhold consent to retransmit its signal stems from Congress' determination

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Nordlicht v. New York Telephone Co., 799 F.2d 859, 862 (2d Cir. 1986)(claims against phone company for money and fraud were governed by federal common law); O'Brien v. Western Union, 113 F.2d 539 (1st Cir. 1940) (sending defamatory message covered by federal common law).

"to compensate the broadcaster for the value its product creates for the cable operator."<sup>20/</sup> Characterizing the benefits cable operators receive from the use of local broadcast signals as a "subsidy," Congress intended to address the "distortion in the video marketplace" by enacting the retransmission consent requirement. Id.

Moreover, Congress clearly distinguished the right to exhibit program content from the right to retransmit the broadcast signal. The Senate Report noted that under the compulsory copyright license, the owners of the programming were compensated for distant signal carried on cable systems. Id. However, "the copyright scheme . . . does not purport to -- and in fact does not -- provide compensation to broadcasters for their rights in their signals." Id. Thus, the retransmission consent provision was created to compensate broadcasters for the value of their signals, and was not intended to create additional compensation for copyright holders.

Therefore, consistent with Congressional intent, the Commission must prohibit program suppliers from entering into or enforcing contracts which supersede any retransmission consent rights. This is especially applicable to affiliation contracts between networks and local stations. The right of a local broadcast station to assert retransmission consent rights was intended by Congress to alleviate an imbalance in the local marketplace. It was not intended to further enhance the bargaining

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<sup>20/</sup> Senate Report Supra, at p. 35

position of the networks by enabling them to skim off a portion of the proceeds resulting from retransmission agreements between the cable operator and the local station.

## VI. CONCLUSION

Armstrong again submits that the must-carry and retransmission consent provisions of the 1992 Cable Act are unconstitutional. As the Commission is well aware, the constitutionality of the must-carry provision is currently being considered by a three judge panel of the United States District Court for the District of Columbia. The retransmission consent issue is being considered alone by Judge Jackson of the same panel. It is Armstrong's hope that the judicial process will not compromise the Constitution in the manner which Congress did by enacting this statute.

Nevertheless, Armstrong understands that the Commission is required to proceed with this rulemaking unless and until Court action intervenes with this process. Thus, Armstrong has carefully outlined above many important steps the FCC should take in implementing these sections of the Act, which include several definitional issues and implementation deadlines. Armstrong has attempted to illustrate the tremendous burdens placed on cable operators by the requirements of this Act, and urges the Commission to recognize that implementation of these requirements will take time. In the retransmission consent "marketplace," negotiations take time. Congress has taken retransmission consent outside the scope of Part 76 of the Commission's rules, and all "rights"

associated with must-carry are negotiable under the retransmission consent provision. Thus, the Commission must allow the parties time to address these issues.

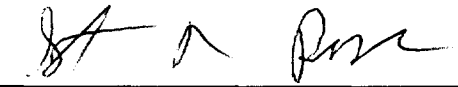
Finally, the Commission must be sensitive to the fact that system reconfigurations, disruptions in the availability of programming, and channel repositioning will undoubtedly create subscriber dissatisfaction. Thus, the Commission also should be cognizant of subscribers' needs in determining implementation deadlines.

Based on the foregoing, Armstrong respectfully requests that the Commission consider its proposals raised herein and incorporate them into its final rules governing mandatory carriage and retransmission consent.

RESPECTFULLY SUBMITTED,

ARMSTRONG UTILITIES, INC.

By:



Stephen R. Ross  
Kathryn A. Hutton

ROSS & HARDIES  
888 16th Street, N.W.  
Washington, D.C. 20006  
(202) 296-8600

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